Supreme Court, U.S.
FILED
MAY 23 2007
OFFICE OF THE CLERK

No. 06-1429

In The

Supreme Court of the United States

OCTOBER TERM 2006

ROBERT FITCH, Acting Superintendent
at Greene Correctional Facility,

Petitioner,

-against-

SEAN EARLEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court Rule 10 2

Respondent Sean Earley ("Respondent") respectfully requests that this Court deny the Petition for a Writ of Certiorari ("Petition") filed by Robert Fitch, Acting Superintendent at Greene Correctional Facility ("Petitioner"), seeking review of a decision of the United States Court of Appeals for the Second Circuit entered in the above-captioned proceedings on June 9, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions stated in the Petition, Respondent submits that the following provision may be involved in resolution of this Petition:

New York Criminal Procedure Law § 440.40

Motion to set aside sentence; by people

1. At any time not more than one year after the entry of a judgment, the court in which it was entered may, upon motion of the people, set aside the sentence upon the ground that it was invalid as a matter of law.

2. Notwithstanding the provisions of subdivision one, the court must summarily deny the motion when the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue.

3. Notwithstanding the provisions of subdivision one, the court may summarily deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment or sentence, unless since the time of such determination there has been a retroactively effective change in the law controlling such issue. Despite such circumstance, however, the court, in the

interests of justice and for good cause shown, may in its discretion grant the motion if it is otherwise meritorious.

4. The motion must be made upon reasonable notice to the defendant and to the attorney if any who appeared for him in the last proceeding which occurred in connection with the judgment or sentence, and the defendant must be given adequate opportunity to appear in opposition to the motion. The defendant has a right to be present at such proceeding but may waive such right in writing. If he does not so waive it and if he is confined in a prison or other institution of this state, the court must cause him to be produced at the proceeding upon the motion.

5. An order setting aside a sentence pursuant to this section does not affect the validity or status of the underlying conviction, and after entering such an order the court must resentence the defendant in accordance with the law.

6. Upon a resentence imposed pursuant to subdivision five, the terms of which are more severe than those of the original sentence, the defendant's time for taking an appeal from the judgment is automatically extended in the manner prescribed in subdivision four of section 450.30.

INTRODUCTION

Petitioner has presented no "compelling reasons" for this Court to grant his Petition for a writ of certiorari. Sup. Ct. Rule 10. Petitioner has failed to demonstrate that the Second Circuit's opinion is in conflict with any decision of this Court or with any other Court of Appeals, or that the Second Circuit decided an important federal question that has not been settled by this Court. Sup. Ct. R. 10(a)-(c). While Petitioner contends that the Second Circuit decision was in error, his claims of error are neither deserving of certiorari nor are they meritorious.

STATEMENT OF THE CASE

Respondent will not burden this Court with a de novo Statement of the Case in addition to that set forth in the Petition. Rather, Respondent will make the following additions, corrections, and emphases.

The instant case involves the question of whether the New York State Department of Correctional Services (hereinafter "DOCS"), a division of the executive branch of the government of New York State, may constitutionally impose an additional custodial sentence upon a defendant that was not pronounced by the judge at sentencing. Respondent is currently incarcerated for violation of a term of post-release supervision ("PRS") that was imposed not by a judge in open court but by DOCS at some unknown time after sentencing. Petitioner seeks review of the Second Circuit order holding that the state courts' denial of Respondent's post-conviction motion to invalidate the extra-judicial imposition of PRS "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

As Petitioner acknowledges, at the time of Respondent's guilty plea and sentence for attempted burglary, the state court did not advise Respondent that a five-year period of PRS was being imposed. Petitioner attempts to minimize the omission by saying that the sentencing court did not "explicitly" advise Respondent, either at plea or sentence, of the five-year period of PRS. Pet. at 9-10. In fact, there is no reference whatsoever to PRS anywhere in the record of those proceedings, explicit, implicit or otherwise. This was not a case where a judge simply neglected or forgot to recite a boilerplate condition of the sentence of which all parties were aware. There is every indication that the reason for the omission

of the PRS component of the sentence is that the parties were simply unaware of the statute (N. Y. Penal Law § 70.45), enacted little over a year before Respondent's sentencing, requiring that PRS be imposed. DOCS took it upon itself to make an administrative "correction" of what it perceived to be a judicial error.

The instant Petition is complicated by the fact that Respondent, in his appeal to the Second Circuit, sought reversal of the judgment denying the writ of habeas corpus on an alternative ground. Since the Second Circuit held in favor of Respondent on the ground that the addition of PRS after sentencing violated federal law, it did not reach or discuss this alternative theory.

This second issue involves whether the state courts' denial of post-conviction relief "was contrary to, or involved an unreasonable application of" this Court's decision in *Santobello v. New York,* 404 U.S. 257 (1971). Respondent pled guilty as part of a negotiated plea bargain, wherein he was promised a sentence of six years' imprisonment with absolutely no mention of PRS. Under *Santobello*, Respondent had a constitutional right to the imposition of the promised sentence of six years, with the addition of a five-year period of PRS. There is no question that this additional sentence was contrary to *Santobello*; the only issue was the remedy -- whether excision of the PRS term was required by *Santobello,* or whether plea withdrawal, a possibility rejected by Respondent though never formally offered, could suffice. Respondent argued to the Second Circuit that after several years had elapsed since the guilty plea, the only "reasonable application" of *Santobello* was vacatur of the PRS term, not plea withdrawal.

Respondent's 2000 Plea and Sentence

In addition to the facts stated in the Petition, it is noteworthy that at Respondent's sentencing, although the judge did not mention the five-year custodial period of PRS, the court clerk did pronounce much less onerous provisions, such as a mandatory surcharge of $150 and a crime victim assistance fee of five dollars. Indeed, the written commitment order mentioned these two nominal fines but also did not hint at any period of PRS or parole.

Petitioner claims that Second Circuit's conclusion that the prosecutor, defense attorney and judge were unaware of the PRS requirement is "unsupported." However, this conclusion was well-supported by simple common sense. Petitioner admits that in hundreds or even thousands of cases throughout the State of New York, the mandatory PRS provision was not mentioned at sentencing. The only reasonable conclusion one can draw is that there was widespread lack of awareness of the relatively new statutory requirement. There was no conceivable motivation, at least on the part of the judge pronouncing sentence, the state prosecutor, and even the court clerk, to intentionally omit stating for the record this onerous provision. Certainly, the Kings County District Attorney's Office, representing Petitioner throughout this litigation, has never offered any explanation for the silence of many of its assistant district attorneys in many different cases about PRS.

Other Additions to Petitioner's Statement of the Case

The Petition states that Magistrate Judge Pohorelsky had issued his Report and Recommendations regarding timeliness of the petition for a writ of habeas corpus.

Since that time, Judge Korman has adopted the Report and Recommendations and found the habeas petition to be timely filed. However, Judge Korman has stayed issuance of the writ of habeas corpus to allow Petitioner to apply to the Second Circuit for a stay pending determination of this Petition for certiorari. That application remains pending as of this writing, and Respondent remains incarcerated solely on violation of his PRS conditions.

REASONS FOR DENYING THE WRIT

POINT I

THE SECOND CIRCUIT MERELY APPLIED SETTLED LAW IN HOLDING THAT THE EXTRA-JUDICIAL IMPOSITION OF A CUSTODIAL SENTENCE OF POST-RELEASE SUPERVISION VIOLATED RESPONDENT'S DUE PROCESS RIGHTS

Petitioner seeks review of the Second Circuit decision holding that the state courts' refusal to excise the extra-judicial imposition of a five-year custodial sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Petitioner does not identify any conflict between the circuits that might require resolution by this Court, nor does Petitioner demonstrate that the Second Circuit decided an important federal question that has not been settled by this Court. Indeed, it seems that the unusual, if not outright bizarre, practice of administrative imposition of an additional sentence after the judicial sentencing has taken place is confined to New York. Essentially, Petitioner simply asks this Court to find that the Second Circuit decision was wrong.

Petitioner's claims of error, which would not be worthy of review by this Court, cannot withstand scrutiny. Petitioner claims that the Second Circuit erred in holding that the state court denial of relief to Respondent was in conflict with this Court's holding in *Hill v. United States ex rel. Wampler,* 298 U.S. 460 (1936). Specifically, Petitioner claims that *Wampler* did not announce a rule of federal law applicable to the states, and thus the state court's rejection of Respondent's claims did not violate *Wampler*; and that the Second Circuit misidentified the holding in *Wampler,* especially in light of this Court's recent decision in *Carey v. Musladin*, ___ U.S. ___, 127 S.Ct. 649 (2006).

Respondent would prefer to consider these claims in reverse order. In *Wampler,* the federal trial judge orally pronounced a sentence of 18 months imprisonment and a $5,000 fine. The clerk of the court added to this sentence a condition that until the defendant paid the fine, he would remain in custody. This Court held that the clerk had no authority to alter the sentence that had been pronounced by the judge, and it invalidated the additional condition. The Court was unequivocal in stating its holding: "The only sentence known to the law is the sentence or judgment entered upon the records of the court . . . . Until corrected in a direct proceeding, it says what it was meant to say, and this by an irrebuttable presumption." 298 U.S. at 464. "A warrant of commitment [prepared by the clerk] departing in matter of substance from the judgment back of it is void . . . .' The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' *Id.* at 465 (citation omitted).

Nevertheless, Petitioner seizes upon an incidental fact present in *Wampler* and argues that the *Wampler* "holding" must be limited to that fact. In *Wampler*, there was no requirement that the defendant be kept in custody until the fine was paid; that provision was discretionary. Petitioner claims that the instant case, a where a state statute required the imposition of a PRS term, does not violate *Wampler*.

The Second Circuit itself did not ignore this factual distinction, but recognized it and decided that the *Wampler* holding was never intended to be restricted to those cases in which there had been judicial discretion:

> We recognize differences between the facts of *Wampler* and those before us. In *Wampler,* the decision whether to keep the defendant in custody pursuant to payment of a fine was, by law, within the discretion of the sentencing judge. Here, by contrast, state law required that Earley be sentenced to a PRS term. Early in his analysis, Justice Cardozo noted this factor, writing that '[t]he choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function. This being so, it must have expression in the sentence, and the sentence is the judgment.' *Id.* at 464, 56 S.Ct. 760 (emphasis added).
>
> Had the Court stopped there, the holding of *Wampler* might extend only to those cases where punishment subsequently added to the defendant's sentence by administrative personnel relates to a matter within the court's discretion; it might have no application to a case such as ours, which involves a mandatory provision. But *Wampler* went on to articulate a broader holding: The judgment of the court establishes a defendant's sentence, and that sentence may not be increased by an administrator's amendment. *Wampler* thus provides clearly established Supreme Court precedent supporting Earley's claim. See also *Greene v. United States,* 358 U.S. 326, 329, 79 S.Ct. 340, 3 L.Ed.2d 340 (1959) (quoting *Wampler*'s assertion that 'the only sentence known to the law is the sentence or judgment entered upon the records of the court'); *Johnson v. Mabry,* 602 F.2d 167, 170 (8th Cir. 1979). The only cognizable sentence is the one imposed by the judge. Any alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect.

451 F.3d at 74-75.

It was neither unreasonable nor incorrect for the Second Circuit to draw from *Wampler* the holding that in all cases, the sentence imposed by the judge may not be altered in an out-of-court proceeding. Justice Cardozo's language regarding the sanctity of the judgment and the invalidity of non-judicial amendments thereto, quoted above, does not allow for exceptions. Any two cases will be factually distinguishable, and to restrict every decision to its individual facts would virtually eliminate the doctrine of *stare decisis* that is at the core of our jurisprudence.

In support of his argument that discretionary nature of the added sentence is of paramount significance, Petitioner seeks remand and reconsideration in light of *Musladin, supra.* In that case, spectators at the Petitioner's murder trial displayed buttons bearing the photo of the victim that were visible to the jury. The Ninth Circuit Court of Appeals held that the state courts' denial of Petitioner's claim of error violated the Supreme Court decisions in *Estelle v. Williams,* 425 U.S. 501 (1976) and *Holbrook v. Flynn,* 475 U.S. 560, 568 (1986). *Musladin v. LaMarque,* 427 F.3d 653 (9th Cir. 2005).

This Court reversed, holding that the *Williams* and *Flynn* cases involved conduct by the state that deprived the defendant of a fair trial. In *Williams,* the accused was forced to wear prison garb at his trial, and in *Flynn*, four uniformed state troopers were seated immediately behind the defendant during his trial. In *Musladin,* this Court highlighted the distinction between the state conduct in *Williams* and *Flynn,* and the "private-actor courtroom conduct" in *Musladin.* The

Court held that it had not previously addressed the latter, and thus the state court ruling was not in conflict with prior Supreme Court rulings involving state conduct at trial.

Notably, neither prisoner in the *Williams* and *Flynn* cases had prevailed in the Supreme Court. In *Williams*, the Court stated that the practice of compelling an accused to wear prison clothing violated the Fourteenth Amendment, but *held* that the defendant had waived any objection to the procedure at trial. In *Flynn,* the Court held that the presence of the troopers did not deny a fair trial, but announced that "the question must be ... whether 'an unacceptable risk is presented of impermissible factors coming into play.'" 475 U.S. at 570, *quoting Williams, supra,* 425 U.S. at 505. Still, this Court in *Musladin* found the state action/private action dichotomy to be decisive, and did not rely on the fact that the actual holdings in the prior cases were against the prisoner.

In urging this Court to find that the Second Circuit decision conflicts with *Musladin,* Petitioner contends that the state-private distinction is comparable to the factual difference between this case and *Wampler.* It is not. Justice Cardozo's declaration of the supremacy of the judgment as pronounced by the judge did not highlight the discretionary nature of the addition imposed by the clerk. The Court's opinion clearly announced that a judge's sentence can only be undone or modified by the judiciary. By contrast, the state-private action distinction is neither illusory nor incidental. It is at the core of innumerable legal issues, such as First Amendment free speech or Fourth Amendment search and seizure questions.

As to Petitioner's claim that *Wampler* is not a constitution-based decision that is binding on the state courts, the Second Circuit again considered this very issue and arrived at the opposite conclusion. The Court stated:

> Although *Wampler* does not identify the source of the rule that it announces, we believe that it is based in the due process guarantees of the United States Constitution. *Wampler* does not hold that the defendant could not have been sentenced to the punishment that the state attempts to impose on him. It simply recognizes that he was not sentenced to that punishment. Any deficiency in the sentence could have been corrected through the proper procedures. The Supreme Court thus recognizes that procedural requirements in sentencing demand that a sentence must be imposed by a judge, on the record, in court.

451 F.3d at 75 n1.

Petitioner does not offer a coherent rebuttal to this analysis, but instead finds significance in the Second Circuit's use of the phrase "we believe." Petitioner claims that to satisfy the AEDPA standard, the Supreme Court precedent must explicitly state its constitutional basis; otherwise, it should be presumed to be based on non-constitutional grounds. That construction stretches AEDPA beyond the breaking point. AEDPA requires that the state court determination of the Petitioner's claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The State takes an imaginative route to arrive at its preferred interpretation, which appears to be: "was contrary to, or involved an unreasonable application of what the Supreme Court has clearly enunciated to be a federal constitutional principle of law." The actual statute, however, does not require the Supreme Court's pronouncement of the rule as one of constitutional dimension, and

it is respectfully submitted that this Court should decline the State's invitation to rewrite the statute in that manner. The Second Circuit did not employ an erroneous standard by reasonably inferring that *Wampler* was grounded in the due process clause.

It also is noteworthy that since the Second Circuit relied upon *Wampler* in *Earley v. Murray,* the New York State courts have interpreted the *Wampler* rule as binding, repeatedly citing that case in holding that where a judge does not announce PRS, the defendant does not have it. *See, e.g., People v. Martinez,* ___ A.D.3d ___, ___ N.Y.S.2d ___, 2007 WL 1502033 (2d Dept. 2007); *People v. Royster,* ___ A.D.3d ___, ___ N.Y.S.2d ___, 2007 WL 1439741 (2d Dept. 2007); *People v. Howell,* ___ A.D.3d ___, ___ N.Y.S.2d ___, 2007 WL 1440942 (2d Dept. 2007); *People v. Guerrero,* 39 A.D.3d 878, 834 N.Y.S.2d 471 (2d Dept. 2007); *People v. Brown,* 39 A.D.3d 659, 834 N.Y.S.2d 262 (2d Dept. 2007); *People v. Thompson,* 39 A.D.3d 572, 831 N.Y.S.2d 720 (2d Dept. 2007); *People v. Sebastian,* 38 A.D.3d 576, 833 N.Y.S.2d 109 (2d Dept. 2007); *People v. Benson,* 38 A.D.3d 563, 831 N.Y.S.2d 266 (2d Dept. 2007); *People v. Wilson,* 37 A.D.3d 855, 829 N.Y.S.2d 917 (2d Dept. 2007); *People v. Noble,* 37 A.D.3d 622, 831 N.Y.S.2d 198 (2d Dept. 2007); *People v. Smith,* 37 A.D.3d 499, 829 N.Y.S.2d 226 (2d Dept. 2007).

In sum, there is no conflict in the circuits, and the Second Circuit did not decide any important question of federal law left open by this Court. There is merely the claim that the Second Circuit arrived at the wrong decision in this

particular case. That Court did not do so, and Petitioner has failed to set forth any reason for this Court to review the Supreme Court's decision.

POINT II

THE STATE COURT DENIAL OF RELIEF TO RESPONDENT WAS CLEARLY IN CONFLICT WITH THIS COURT'S HOLDING IN *SANTOBELLO V. NEW YORK,* 404 U.S. 257 (1971), AN ISSUE THAT THE SECOND CIRCUIT DID NOT REACH, BUT ONE THAT WOULD WARRANT ISSUANCE OF THE WRIT OF HABEAS CORPUS ON AN ALTERNATIVE GROUND

In addition to the point on which the Second Circuit reversed the judgment of the district court denying the petition for a writ of habeas corpus, Respondent raised an alternative meritorious ground. Respondent pled guilty as part of a negotiated plea bargain, at which he was promised a sentence of six years' imprisonment. There was absolutely no mention of any additional penalty, including PRS. Pursuant to this Court's decision in *Santobello v. New York,* 404 U.S. 257 (1971), Respondent, when he returned for sentencing, had a constitutional right to the imposition of the promised sentence of six years' imprisonment. While he in fact did receive that sentence, subsequently a PRS period was added to his sentence in violation of both his plea promise and his constitutional rights under *Santobello.*

In *Santobello,* the defendant pled guilty as part of a plea bargain in which the prosecutor agreed to make no recommendation as to the sentence. At sentencing, a new prosecutor appearing before a new judge recommended the maximum sentence, which was imposed. The conviction and sentence were affirmed in the state courts, but this Court reversed, holding: "[W]hen a plea rests in any

significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262.

In the instant case, there was no question in the district court that the principle of *Santobello* was violated, as Respondent was given a greater sentence than the one he had been promised. The only question was the appropriate remedy. The district court held that the only appropriate remedy was plea withdrawal, an option that Respondent had indicated he would not accept. However, the offer of only plea withdrawal was not a reasonable remedy under *Santobello*. The only reasonable application would be specific performance by deletion of the plea promise.

In *Santobello,* this Court discussed the question of relief, concluding:

> we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration. *The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty.*

Id. at 262-263 (emphasis added).

In his concurring opinion, Justice Douglas stated:

> I join the opinion of the Court and favor a constitutional rule for this as well as for other pending or oncoming cases. Where the 'plea bargain' is not kept by the prosecutor, the sentence must be vacated and the state court will decide in light of the circumstances of each case whether due process requires (a) that there be specific performance of the plea bargain or (b) that the defendant be given the option to go to

> trial on the original charges. One alternative may do justice in one case, and the other in a different case. *In choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State.*

Id. at 267 (emphasis added).

While the Court's majority opinion did not go as far as Justice Douglas's formulation of "considerable, if not controlling" deference to a defendant's chosen remedy, it still entrusted to the state court's discretion to determine the "ultimate relief" based on "whether the circumstances of this case require only that there be specific performance of the agreement on the plea" or withdrawal of the guilty plea, which was sought by the defendant in *Santobello*. In the instant case, the state court made available to Respondent only the impractical and unfair remedy of plea withdrawal, thereby unreasonably applying *Santobello* to the facts of this case.

In the instant case, Respondent requested that the court not vacate his plea, but grant him the other remedy of specific performance of the negotiated plea of six years' imprisonment. Under the circumstances, specific performance was the only reasonable remedy for this constitutional violation. By the time his state court motion to vacate his sentence was denied, Respondent already had served more than three years[1] in prison and he was due for release in fewer than two years, making

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[1] The DOCS sentence computation sheet shows that petitioner was accepted into state custody on March 30, 2000, with 231 days of jail time credit. While he promptly filed a motion to change his sentence in July, 2002, it was still eight more months before that motion was decided on March 4, 2003. Thus, petitioner was not, and could not be, offered withdrawal of his guilty plea until three years eight months, or more than 70% of his sentence of imprisonment, had been served.

plea withdrawal manifestly "unreasonable". As the PRS component of the sentence was added without any notice to him, Respondent was unable to obtain any judicial finding of a *Santobello* violation until that time. If he had accepted the option of plea withdrawal, those years of imprisonment were irreversible even if he were acquitted at trial. At that point, his prospects virtually forced him to reject any possibility of plea withdrawal. The only reasonable remedy would have been specific performance of the bargained-for sentence, regardless of whether it violated New York statutory law.

In *Spence v. Superintendent, Great Meadow Correctional Facility,* 219 F.3d 162, 174-175 (2d Cir. 2000), the Second Circuit held: "Where defendant has already been imprisoned for eight years, nearly the minimum term of the sentence imposed by the trial judge, after he had been promised probation, it is unfair to remand for a state sentencing court to exercise an option that would force Spence to forsake a bargain he had kept, withdraw his plea, and face trial." While Respondent had not served quite that much time, the unfairness is the same.

The state court and federal district court refused to consider excision of the PRS component of the sentence because it was mandated by state statute. However, where there is a conflict between Respondent's constitutional rights and New York statutory law, the former must be deemed paramount. In *Gray v. Mississippi*, 481 U.S. 648, 663 (1987), this Court held: "In a situation such as this where a constitutional right comes into conflict with a statutory right, the former prevails." If Respondent's constitutional rights under *Santobello* could only be protected by

specific performance of the plea bargain, the state statute posed no impediment therefor.

Indeed, even New York statutory law did not bar the removal of a sentence of PRS. The Criminal Procedure Law provided a mechanism by which unlawful sentences could be changed by the State. The State had one year to move to modify the sentence, and if it failed to do so, the "unlawful" sentence would then stand. CPL § 440.40. Thus, Respondent's constitutional right to receive a sentence he was promised should surely triumph over the State's right to have a lawful sentence imposed, a right it clearly had waived or abandoned under state law.

The Seventh Circuit has twice held that only specific performance of the plea promise could be deemed reasonable in circumstances almost identical to the case at bar. In *U.S. ex rel. Russo v. Attorney General of Illinois*, 780 F.2d 712 (7th Cir. 1986), the petitioner pled guilty and was not informed that Illinois law required that a five-year mandatory parole term would be imposed in addition to a prison sentence. The Court of Appeals held that the petitioner's due process rights were thereby violated. The Court also determined that the appropriate remedy would be to expunge the parole term from his sentence: "In remedying the wrong that has been committed, fundamental fairness can be achieved by eliminating Russo's mandatory parole term so that his sentence comports with the bargain he made." *Id.* at 719. In *U.S. ex rel. Ferris v. Finkbeiner,* 551 F.2d 185 (7th Cir. 1977), the Court also vacated a mandatory five-year parole term of which the defendant was not informed, finding that plea withdrawal would be unfair. "Since Ferris has substantially begun performing his side of the bargain, it would not be fair to vacate the plea and require him to go through the procedure anew. Fundamental fairness can be had by limiting his term of custody to that portion of the sentence which

comports with the bargain made." *Id.* at 187.

The same relief is mandated here. There is an apparent conflict between Respondent's constitutional rights and a state statute, Penal Law § 70.45. Respondent's PRS term violates the former, and the only reasonable remedy, eliminating the PRS, would run afoul of the latter. Respondent is entitled to enforcement of his constitutional rights over the state PRS statute.

Thus, even if this Court were inclined to grant certiorari to resolve the issues presented by the Second Circuit opinion, the existence of this alternative ground for issuance of the writ of habeas corpus makes this case a poor choice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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DATED: May 29, 2007